

No. 15188

---

United States  
Court of Appeals  
for the Ninth Circuit

---

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, et al.,  
Appellees.

---

Transcript of Record

---

Appeal from the United States District Court for the Southern  
District of California, Central Division

FILED

DEC 11 1956

PAUL P. O'BRIEN, CLERK



No. 15188

---

United States  
Court of Appeals  
for the Ninth Circuit

---

EO MANTIN,

Appellant,

vs.

ROADCAST MUSIC, INC., a corporation, et al.,  
Appellees.

---

Transcript of Record

---

Appeal from the United States District Court for the Southern  
District of California, Central Division

---



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled therein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Adoption of Statement of Points and Designation of Record (USCA)..... 61

Affidavits of Paul Kerby and Werner Janssen Submitted by Plaintiff in Opposition to Defendant's Motion to Dismiss..... 20

Exhibit 1—Copy of Sheet Music "The Song From Moulin Rouge" as Published by Broadcast Music, Inc.....24-25

Exhibit 2—Manuscript of Song "Where Is Your Heart" Written by Plaintiff..... 26

Amended Complaint for Damages, Superior Court Case No. 427,556, John Italiani vs. Metro-Goldwyn Mayer Corp. et al..... 34

Appeal:

Adoption of Statement of Points and Designation of Record on (USCA)..... 61

Certificates of Clerk to Transcript of Record on .....54, 59

Notices of Appeal on.....51, 57

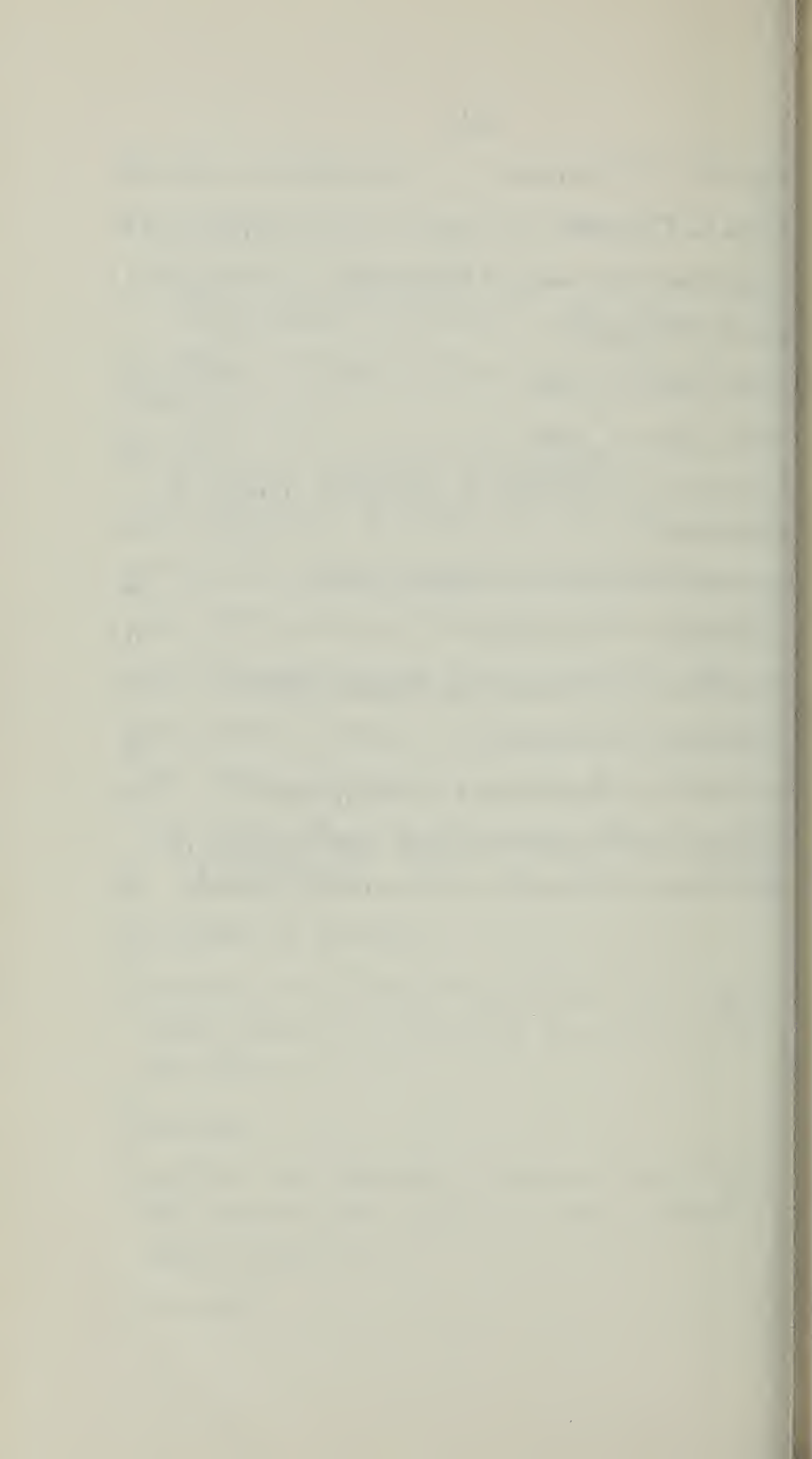
Statement of Points on (DC)..... 52

Appeal—(Continued):

Stipulation as to Record on (DC).....	53
Stipulation re Notice of Appeal and Inclusion of Certificate of Finality in Record on.....	58
Certificate of Clerk to Transcript of Record....	54
Supplemental .....	59
Certificates of Copyright Registration:	
No. 518,734, J. A. Webb, Aug. 30, 1921.....	35
No. 49787, Donn H. Marsh, Jan. 6, 1932.....	36
No. 135744, Randall McClelland, Nov. 27, 1936	37
No. 140536, Sylvester L. Cross, Feb. 19, 1937..	38
No. 197987, Thomas G. Dennis, June 30, 1939	39
No. 209074, Richard C. Carder, Nov. 24, 1939	40
No. 74528, Beryl H. Rodrigue, May 9, 1947 (Application) .....	40
Certificate of Finality.....	56
Certificate of Copyright Registration No. E pub. 69688, Class E to Broadcast Music, Inc., Feb. 20, 1953 .....	42
Complaint .....	3
Complaint for Damages, Superior Court Case No. 427,556, John Italiani vs. Metro-Goldwyn Mayer Corp. et al. ....	27
Amended .....	34

iii.

Judgment of Dismissal.....	48
Motion to Dismiss.....	14
Names and Addresses of Attorneys.....	1
Notices of Appeal:	
Filed June 6, 1956.....	51
Filed Aug. 3, 1956.....	57
Objections of Plaintiff to Proposed Order of Dismissal .....	43
Statement of Points on Appeal (DC).....	52
Adoption of (USCA).....	61
Stipulation as to Record on Appeal (DC).....	53
Adoption of (USCA).....	61
Stipulation re Amendment of Complaint.....	17
Stipulation re Notice of Appeal and Inclusion of Certificate of Finality in Record on Appeal..	58





## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

FENDLER & LERNER,  
HAROLD A. FENDLER,  
ROBERT W. LERNER,  
ROBERT HAVES,

333 South Beverly Drive,  
Beverly Hills, California.

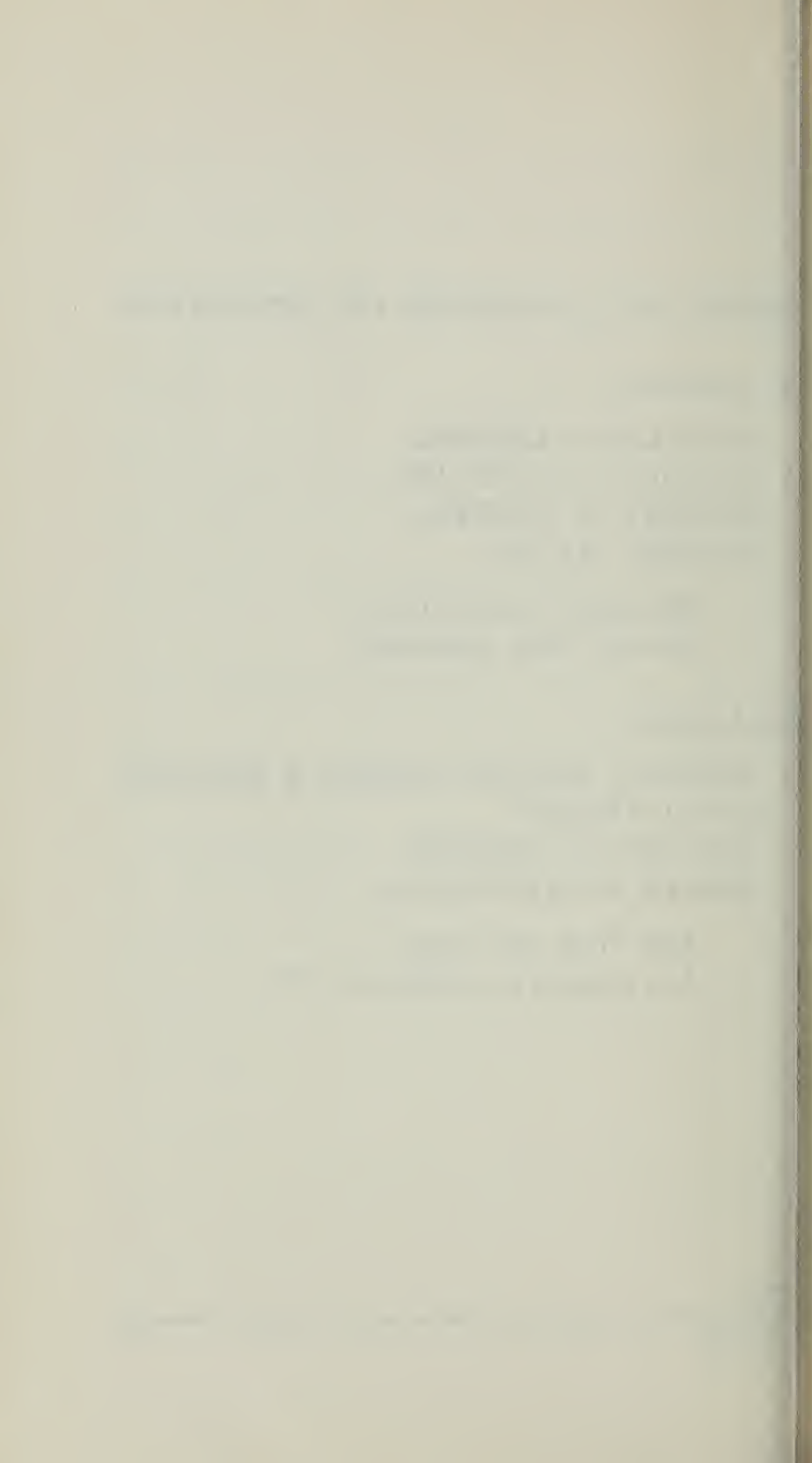
For Appellee:

WRIGHT, WRIGHT, GREEN & WRIGHT,  
LOYD WRIGHT,  
DUDLEY K. WRIGHT,  
EDGAR R. CARVER, JR.,

1125 West 7th Street,  
Los Angeles 14, California. [1\*]

---

\* Page numbers appearing at foot of page of original Transcript of Record.



In the District Court of the United States for the  
Southern District of California, Central Division

No. 17785-PH

LEO MANTIN,

Plaintiff,

vs.

BROADCAST MUSIC, INC., a New York corporation, et al.,  
Defendants.

COMPLAINT FOR DAMAGES FOR MISAP-  
PROPRIATION OF COMMON LAW MUSI-  
CAL PROPERTY AND FOR INJUNCTION  
AND ACCOUNTING OF PROFITS

(Jury Trial Requested)

Now comes the plaintiff above named, and for a first cause of action against the defendants above named and each of them, alleges as follows:

First Cause of Action

I.

That plaintiff is an internationally known producer of musical acts and revues (including a well known musical sketch entitled "Moulin Rouge") and plaintiff is himself a professional entertainer and composer residing in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the defendants Broadcast Music, Inc., a New York corporation; United Artists Corporation, a Delaware corporation; Columbia Broadcasting System, Inc., a New York corporation; National Broadcasting

Company, Inc., a New York corporation; American Broadcasting Company, Inc., a Delaware corporation; Romulus Films, Ltd., a corporation; London Record Sales, Inc., a New York corporation; Brunswick Record Corporation, a New York corporation; Capitol Records Distributing Co., Inc., of California, a Delaware corporation; Capitol Records Distributing Co., Inc., of Georgia, a Delaware corporation; Columbia Recording Corporation, a Delaware corporation; Columbia Recording Corporation, a New York corporation; Decca Distributing Corporation, a New York corporation; Decca Records, Inc., a New [3] York corporation; Mercury Record Corporation, a Delaware corporation; Mercury Record Distributors, Inc., an Illinois corporation; RCA Victor Company, Inc., a Maryland corporation; Radio Corporation of America, a Delaware corporation; RCA Manufacturing Co., Inc., a Delaware corporation, Doe One Corporation, Doe Two Corporation, Doe Three Corporation, Doe Four Corporation, Doe Five Corporation, Doe Six Corporation, Doe Seven Corporation, Doe Eight Corporation, Doe Nine Corporation and Doe Ten Corporation were and are now corporations duly organized and existing under and by virtue of the laws of the State of New York, Illinois, Maryland, or Delaware, or states or nations other than the State of California, although said defendants and each of them are either duly qualified to do business in the State of California or have been doing business in the State of California and in the County of Los Angeles.

III.

That the defendants, Doe One, Doe Two, Doe Three, Doe Four and Doe Five are residents and citizens of states other than the State of California.

IV.

That the fictitiously named defendants, Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe One Corporation, Doe Two Corporation, Doe Three Corporation, Doe Four Corporation, Doe Five Corporation, Doe Six Corporation, Doe Seven Corporation, Doe Eight Corporation, Doe Nine Corporation and Doe Ten Corporation are named herein by said fictitious names for the reason that the true names of said defendants are unknown to plaintiff, but plaintiff asks leave and permission of Court to insert the true names when ascertained. [4]

V.

That this action is brought for infringement of plaintiff's common law rights in that certain musical composition more particularly referred to hereinafter in this complaint, and this Court has jurisdiction of this cause of action under and by virtue of Section 1332 of Title 28, U. S. Code Judiciary and Judicial Procedure, by reason of diversity of citizenship between plaintiff and defendants, and by reason of the fact that the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

VI.

That during the year 1922, plaintiff originated,



created and composed a unique, novel and original song and musical composition, with words and music, entitled "Where Is Your Heart", which song and musical composition have never at any time been published in any form by plaintiff or with plaintiff's knowledge, authority and consent, and have at all times remained in manuscript form, and plaintiff has at all times owned and retained and does now own and retain all common law rights therein and thereto. A true copy of the words and music of said song and composition is being filed with the Clerk of this Court concurrently with the filing of this complaint, marked plaintiff's Exhibit A, and by this reference incorporated herein the same as if fully set forth at length herein.

## VII.

That plaintiff has sung and performed his said song entitled "Where Is Your Heart" in nightclubs, music halls, theatres, hotels and other places of amusement and entertainment in the United States, England, France, and many other countries throughout the world, and at all times hereinafter referred to in this complaint, defendants and each of them have had full [5] knowledge and notice of plaintiff's rights of ownership and exclusive rights of performance, use and exploitation of said song and musical composition throughout the world.

## VIII.

That notwithstanding said notice and knowledge by defendants of plaintiff's rights in the premises,

defendant Romulus Films, Ltd., heretofore produced, and on or about the 1st day of February, 1953, in conjunction with defendant United Artists Corporation, released, distributed and caused to be exhibited in the County of Los Angeles, State of California, and in each and all of the other states of the United States, and elsewhere throughout the world, a motion picture photoplay entitled "Moulin Rouge", in which was incorporated and recorded a song entitled "Where Is Your Heart", sung by a character portrayed in said motion picture by Miss Zsa Zsa Gabor, and which song substantially copies and appropriates the words and music of plaintiff's original song and composition entitled "Where Is Your Heart".

#### IX.

That during the year 1953, and continuously up to and including the date of filing this complaint, defendant Broadcast Music, Inc. published or caused to be published said song entitled "Where Is Your Heart" or "The Song From Moulin Rouge" in sheet music form, and said defendant has caused said sheet music to be used by professional entertainers and to be sold and distributed to the general public continuously to, until and including the date of filing this complaint, in the County of Los Angeles, State of California, and elsewhere throughout the United States and the rest of the world. [6]

#### X.

That continuously from on or about the 1st day of February, 1953, up to and including the date of

filing this complaint, defendants London Record Sales, Inc., Brunswick Record Corporation, Capitol Records Distributing Co., Inc. of California, Capitol Records Distributing Co., Inc. of Georgia, Columbia Recording Corporation (a Delaware corporation), Columbia Recording Corporation (a New York corporation), Decca Distributing Corporation, Decca Records, Inc., Mercury Record Corporation, Mercury Record Distributors, Inc., RCA Victor Company, Inc., Radio Corporation of America, RCA Manufacturing Co., Inc., have caused said song entitled "Where Is Your Heart" or "The Song From Moulin Rouge" to be recorded on phonograph records and sold and distributed to the general public in the County of Los Angeles, State of California, and in each and all of the other states of the United States and elsewhere throughout the world.

## XI.

That continuously from on or about the 1st day of February, 1953, up to and including the date of filing this complaint, defendants Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and American Broadcasting Company, Inc., have caused said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge" to be performed and broadcast over the facilities of the radio broadcasting systems owned and operated by said defendants and have caused the same to be broadcast and rebroadcast over hundreds of radio stations through-



out the United States, including the County of Los Angeles, State of California. [7]

## XII.

That a copy of said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge", recorded in said motion picture film, published in said sheet music form, recorded on said phonograph records and sold and distributed by the defendant phonograph recording companies named in this complaint, and which song was performed and broadcast over the radio broadcasting facilities of the defendant broadcasting corporations, all as hereinbefore alleged herein, is in the musical form and content marked Exhibit B, filed with the Clerk of this Court concurrently with the filing of this complaint, and incorporated by this reference herein.

## XIII.

That each and all of the acts of defendants hereinbefore alleged in this complaint were done, committed and performed with full notice and knowledge of plaintiff's rights in the premises and without the authority or consent of plaintiff, and in deliberate violation of plaintiff's said rights, to plaintiff's damage generally in the sum of \$500,000.00, no part or portion of which has been paid to plaintiff, and the whole of which remains due, owing and unpaid to plaintiff.

### Second Cause of Action

#### I.

Plaintiff hereby adopts and by this reference in-

corporate herein each and every allegation alleged and contained in paragraphs, I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of plaintiff's first cause of action, the same as if fully set forth at length herein. [8]

## II.

That by reason of plaintiff's widespread use, performance and singing of his said original song and musical composition entitled "Where Is Your Heart" for more than thirty years last past, in hotels, nightclubs, theatres and places of entertainment throughout the world, thousands of persons in the entertainment industry and hundreds of thousands of persons constituting the general public have learned to identify plaintiff's said song and the title thereof with plaintiff, and a secondary meaning has attached thereto by which the entertainment industry generally and the general public has for more than thirty years last past identified the song and musical composition entitled "Where Is Your Heart" solely with the plaintiff herein.

## III.

That by reason of defendants' acts hereinbefore alleged in this complaint, the entertainment industry and the general public has during the year 195 and continuously up to and including the date of filing this complaint, been confused and misled by defendants' acts aforesaid into the belief that plaintiff is not and never was the originator and creator of his own original song and musical composition entitled "Where Is Your Heart" (a copy of which

has been filed with the Clerk of this Court, marked Exhibit A), and plaintiff has thereby been deprived of all recognition and credit as the originator, creator and composer of said song and musical composition, and plaintiff has also been deprived and precluded by defendants' said acts from claiming rights of title or ownership in or to said song or musical composition or from publicly performing the same for profit. [9]

#### IV.

That by reason of the premises, defendants have continuously since on or about the 1st day of February, 1953, engaged in unfair competition with the plaintiff, by reason of the use, advertising and exploitation of the title of plaintiff's original song and musical composition entitled "Where Is Your Heart", to which a secondary meaning had previously attached and with which plaintiff had been previously identified, as hereinbefore alleged, in the minds of the entertainment industry and in the minds of the general public throughout the world.

#### V.

That by reason of the premises, plaintiff has been damaged in the further and additional sum of \$250,000.00, no part or portion of which has been paid to plaintiff by defendants and the whole of which remains due, owing and unpaid.

#### Third Cause of Action

##### I.

Plaintiff hereby adopts and by this reference in-

corporate herein each and every allegation alleged and contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of plaintiff's first cause of action, and paragraphs II, III and IV of plaintiff's second cause of action, the same as if fully set forth at length herein.

## II.

That defendants Romulus Films, Ltd. and United Artists Corporation threaten and intend to continue to release, distribute and exhibit said motion picture entitled "Moulin Rouge" to the general public, containing said song entitled "Where Is Your Heart", and each and every other defendant named in this complaint threatens and intends to do and perform the infringing [10] acts more particularly hereinbefore alleged in this complaint, unless restrained and enjoined from so doing by order and injunction of this Court.

## III.

That unless defendants and each of them are enjoined and restrained from further use, performance and exploitation of said song and musical composition entitled "Where Is Your Heart" or "The Song From Moulin Rouge" hereinbefore identified as Exhibit B herein, plaintiff will suffer and continue to sustain irreparable injury and damage for which he has no adequate remedy at law.

## IV.

That by reason of defendants' said acts of in-



fringement upon plaintiff's common law rights as hereinbefore alleged in this complaint, defendants and each of them have secured and will continue to secure each and all of the profits, benefits and privileges to which plaintiff is solely and exclusively entitled by reason of his ownership of said song and musical composition hereinbefore more specifically identified in this complaint, and by reason of the premises plaintiff is entitled to an accounting from each defendant named in this complaint as to each and all profits received or derived by said defendant by reason of such defendant's participation in said infringing acts aforesaid.

Wherefore, plaintiff prays for judgment against defendants as follows:

1. Upon plaintiff's first cause of action, for damages in the sum of \$500,000.00, together with plaintiff's costs of suit incurred herein. [11]

2. Upon plaintiff's second cause of action, plaintiff prays for damages in the sum of \$250,000.00, together with plaintiff's costs of suit incurred herein.

3. Upon plaintiff's third cause of action, plaintiff prays for an injunction perpetually restraining and enjoining the defendants from further acts of infringement upon plaintiff's common law rights and from further acts of unfair competition with plaintiff, and plaintiff further prays for an accounting of profits by each defendant named in this complaint as to all profits made by such defendant by reason of such defendant's participation in the acts

of infringement and unfair competition more particularly alleged in this complaint, together with plaintiff's costs of suit herein.

4. For such other, further and different relief as the Court shall deem just and proper.

FENDLER AND LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff

### DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury upon each and every issue of fact raised by plaintiff's first and second causes of action, and by paragraph I of plaintiff's third cause of action.

FENDLER & LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff [12]

Duly Verified. [13]

[Endorsed]: Filed January 19, 1955.

---

[Title of District Court and Cause.]

### MOTION TO DISMISS UNDER RULES 9 (f) and 12 (b) (6)

The defendants, Broadcast Music, Inc., a New York corporation, United Artists Corporation, a Delaware corporation, Columbia Broadcasting System, Inc., a New York corporation, Radio Corporation of America, a Delaware corporation, Capitol

Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and also formerly known as Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation, (dissolved as of September 30, 1954 and since that date a part of Columbia Broadcasting System, Inc., a New York corporation) and each of them, individually, move the court as follows:

1. To dismiss the action pursuant to the provisions of Rules 9 (f) and 12 (b) (6) on the ground that the complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted by reason of the fact that:

(a) It affirmatively appears on the face of said complaint that plaintiff has no property right in the alleged musical composition entitled "Where Is Your Heart" because said property is no longer in the possession of plaintiff inasmuch as plaintiff has made the same public and has, therefore, lost all rights therein under the laws of the state of California and particularly, California Civil Code Sections 980 and 983 as said code sections existed prior to December 23, 1952 and subsequent to 1922, and

(b) It affirmatively appears on the face of said complaint (as amended by stipulation) that plaintiff's alleged claim is barred by the Statutes of Limitations of the forum, to wit, California Code of Civil Procedure Section 339, Subdivision 1, and

(c) It affirmatively appears on the face of said complaint that defendants' musical composition entitled "The Song From Moulin Rouge" (copyright 1953 by Broadcast Music, Inc.) (Exhibit B, deposited with the Clerk) is so dissimilar to plaintiff's alleged musical composition "Where Is Your Heart", (Exhibit A deposited with the Clerk) both as to lyric and music that, as a matter of law, defendants' said musical composition does not infringe or violate any rights which plaintiff may have in said alleged musical composition entitled "Where Is Your Heart".

Said Motion is based upon all of the papers, documents, and pleadings on file in the above entitled matter, the Points and Authorities annexed hereto and by this reference made a part hereof, and upon such matters as defendants may, at the time of the hearing of said Motion, request the court to consider on the basis of Judicial notice.

Dated: April 5th, 1955.

LOYD WRIGHT,  
CHARLES A. LORING,  
WRIGHT, WRIGHT, GREEN &  
WRIGHT,

/s/ By CHARLES A. LORING,  
Attorneys for said Defendants

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1955.



[Title of District Court and Cause.]

STIPULATION RE AMENDMENT  
OF COMPLAINT

Come now the plaintiff, Leo Mantin, and the defendants, Broadcast Music, Inc., a New York corporation, United Artists Corporation, a Delaware corporation, Columbia Broadcasting System, Inc., a New York corporation, Radio Corporation of America, a Delaware corporation, Capitol Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation, (dissolved as of September 30, 1954, and since that date a part of Columbia Broadcasting System, Inc., a New York corporation) through the undersigned, their attorneys of record, and stipulate that Paragraph VIII, page 5, of plaintiff's complaint herein shall be deemed amended to read as follows:

VIII.

That notwithstanding said notice and knowledge by defendants [19] of plaintiff's rights in the premises, defendant Romulus Films, Ltd., heretofore produced, and on or about the 23rd day of December, 1952, in conjunction with defendant United

Artists Corporation, first released and thereafter continuously since said date, during the years 1953, 1954 and 1955, to, until and including the date of filing this amendment to the complaint herein, said defendants distributed and caused to be exhibited in the County of Los Angeles, State of California, and continuously since February 1, 1953, said defendants released and caused to be exhibited in each and all of the other states of the United States, and elsewhere throughout the world, a motion picture photoplay entitled "Moulin Rouge", in which was incorporated and recorded a song entitled "Where Is Your Heart", sung by a character portrayed in said motion picture by Miss Zsa Zsa Gabor, and which song substantially copies and appropriates the words and music of plaintiff's original song and composition entitled "Where Is Your Heart", and said defendants have caused said song as an integral part of said motion picture photoplay to have been sung and performed as a part of each public exhibition of said motion picture photoplay within the State of California and elsewhere throughout the world, continuously during the years 1953, 1954 and 1955, to, until and including the date of filing this amendment herein.

Dated: April 12, 1955.

LOYD WRIGHT,  
CHARLES A. LORING,  
WRIGHT, WRIGHT, GREEN &  
WRIGHT,

/s/ By CHARLES A. LORING,  
Attorneys for Defendants, Broadcast Music, Inc., a  
New York corporation; United Artists Cor-  
poration, a Delaware corporation; Columbia  
Broadcasting System, Inc., a New York cor-  
poration; Radio Corporation of America, a  
Delaware corporation; Capitol Records Dis-  
tributing Corp., a Delaware corporation, form-  
erly known as Capitol Records Distributing  
Co., Inc., of California, and Capitol Records  
Distributing Co., Inc., of Georgia, and Colum-  
bia Records, Inc., formerly known as Columbia  
Recording Corporation, a Delaware corpora-  
tion.

FENDLER & LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff

It is so ordered.

Date: 4-18-55.

/s/ PEIRSON M. HALL,  
Judge

[20]

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

AFFIDAVITS OF EXPERTS PAUL KERBY  
AND WERNER JANSSEN, SUBMITTED  
BY PLAINTIFF IN OPPOSITION TO DE-  
FENDANTS' MOTION TO DISMISS [21]

AFFIDAVIT OF PAUL KERBY

State of California,  
County of Los Angeles—ss.

Paul Kerby, being first duly sworn, deposes and says:

That he is a composer and conductor of music and that he has been so engaged for a period of thirty years last past; that he is the author of numerous published works and a member of the American Society of Composers, Authors and Publishers and an associate of the Royal Academy of Music of London.

That your deponent has examined the published copy in sheet music form of The Song From Moulin Rouge, alternate title Where Is Your Heart, of which Georges Auric and William Engvick are stated thereon as the writers of the music and lyrics, respectively, a copy of which sheet music is hereto annexed and marked Exhibit 1.

Deponent has also examined the manuscript of the song [22] written by the plaintiff, a copy of which is hereto attached marked Exhibit 2.

That your deponent is informed that the above named plaintiff contends that the manuscript which

is Exhibit 2 was written before the musical number contained in Exhibit 1. Upon that assumption, The Song From Moulin Rouge (alternate title Where Is Your Heart) is in the opinion of your deponent copied note for note, with slight variations or exceptions, from the song which is shown on Exhibit 2, and in the opinion of your deponent the song which is Exhibit 1 could not have been originally produced or written without recourse to the song which is Exhibit 2. That the similarity between the two songs as disclosed by the exhibits is in the opinion of your deponent so complete as to preclude the possibility of coincidence.

Dated at Los Angeles this 9th day of June 1955.

/s/ PAUL KERBY

Subscribed and sworn to before me this 9th day of June, 1955.

[Seal]        /s/ GERTRUDE CASTY,  
Notary Public in and for said  
County and State. [23]

### AFFIDAVIT OF WERNER JANSSEN

State of California,  
County of Los Angeles—ss.

Werner Janssen, being first duly sworn, deposes and says:

That he is a conductor and director of symphony orchestras by profession and has been so engaged for upwards of twenty-five years last past; that



your deponent has variously conducted symphony orchestras in Europe, New York and Los Angeles; that your deponent's most recent appearances in 1955 were as conductor of the Symphony of the Air in Carnegie Hall, New York.

That your deponent has heard the song entitled The Song From Moulin Rouge (alternate title Where Is Your Heart), produced in the motion picture production "John Huston's Moulin Rouge," and has seen the publication thereof in sheet music form bearing the [24] publisher's name, "Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y." The copy exhibited to your deponent bore the marking "Music by Georges Auric, Lyrics by William Engvick."

Your deponent compared the printed music, of which an exact copy is hereto annexed marked Exhibit 1, with the song as recorded with the said motion picture photoplay and as reproduced from the sound record synchronized therewith, and found the song so recorded to be identical with the words and music in the annexed copy.

That your deponent has compared the song so published and so recorded with the manuscript of a song written by the plaintiff, a photostat of said manuscript being attached hereto and marked Exhibit 2.

That the notes in Exhibit 1 are practically identical with the notes in the manuscript copy which is Exhibit 2, with a difference in key, and the

words of Exhibit 1 bear a similarity to the words on Exhibit 2.

That the notes in Exhibit 1 being practically identical to the notes of Exhibit 2, your deponent is of the opinion that Exhibit 1 could hardly have been originally composed, assuming, as your deponent is informed, that Exhibit 2 was composed before Exhibit 1.

That the music contained in Exhibit 2, in the opinion of your deponent, is an original composition not copied or adapted from any other work and is not reminiscent of any other melody or musical composition known to your deponent.

/s/ WERNER JANSSEN

Subscribed and sworn to before me this 7th day of June 1955.

[Seal]      /s/ RUTH MEYERS,  
Notary Public in and for said  
County and State

Affidavit of Service by Mail attached. [31]

[Endorsed]: Filed June 13, 1955.

the following: (1) the patient's condition, (2) the patient's wishes, (3) the patient's family, (4) the patient's community, (5) the patient's country, (6) the patient's world.

The patient's condition is the first and most important factor in the physician's decision-making process. The patient's wishes are the second most important factor. The patient's family is the third most important factor. The patient's community is the fourth most important factor. The patient's country is the fifth most important factor. The patient's world is the sixth most important factor.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.

The physician's decision-making process is a complex one. It involves many factors, and the physician must weigh each factor carefully. The physician must also be aware of the patient's condition, wishes, family, community, country, and world.



# THE SONG FROM MOULIN ROUGE

(WHERE IS YOUR HEART)

Music by  
GEORGES AURIC

Lyric by  
WILLIAM ENGVIK



ROMULUS  
presents

José  
FERRER

John Huston's  
in **MOULIN  
ROUGE**

with  
ZSA ZSA GABOR · SUZANNE FLON

and introducing  
**COLETTE  
MARCHAND**

A ROMULUS PRODUCTION • Directed by JOHN HUSTON  
Screenplay by Anthony Veiller and John Huston  
From the novel "MOULIN ROUGE" by PIERRE LA MURE  
Released thru United Artists

PRICE  
**60c**  
(In U. S. A.)

COLOR BY  
**Technicolor**

BROADCAST MUSIC, INC. • 589 FIFTH AVENUE • NEW YORK 17, N. Y.

EXHIBIT 1.



# The Song From Moulin Rouge

(Where Is Your Heart)

Lyric by  
WILLIAM ENGWICK

Music by  
GEORGES AURIC

Moderato

mp *rall.*

*p*

When - ev - er we kiss, I wor - ry and won - der... Your

lips may be near, but WHERE IS YOUR HEART? It's

al - ways like this, I wor - ry and won - der... You're close to me

Copyright 1953 by BROADCAST MUSIC INC., 540 5th Ave., New York 36, N.Y.  
International Copyright Secured  
All Rights Reserved Including Public Performance for Profit

25

3

here, but WHERE IS YOUR HEART? It's a sad thing to re - al -

ize that you've a heart that nev - er melts. When we kiss, do you close your

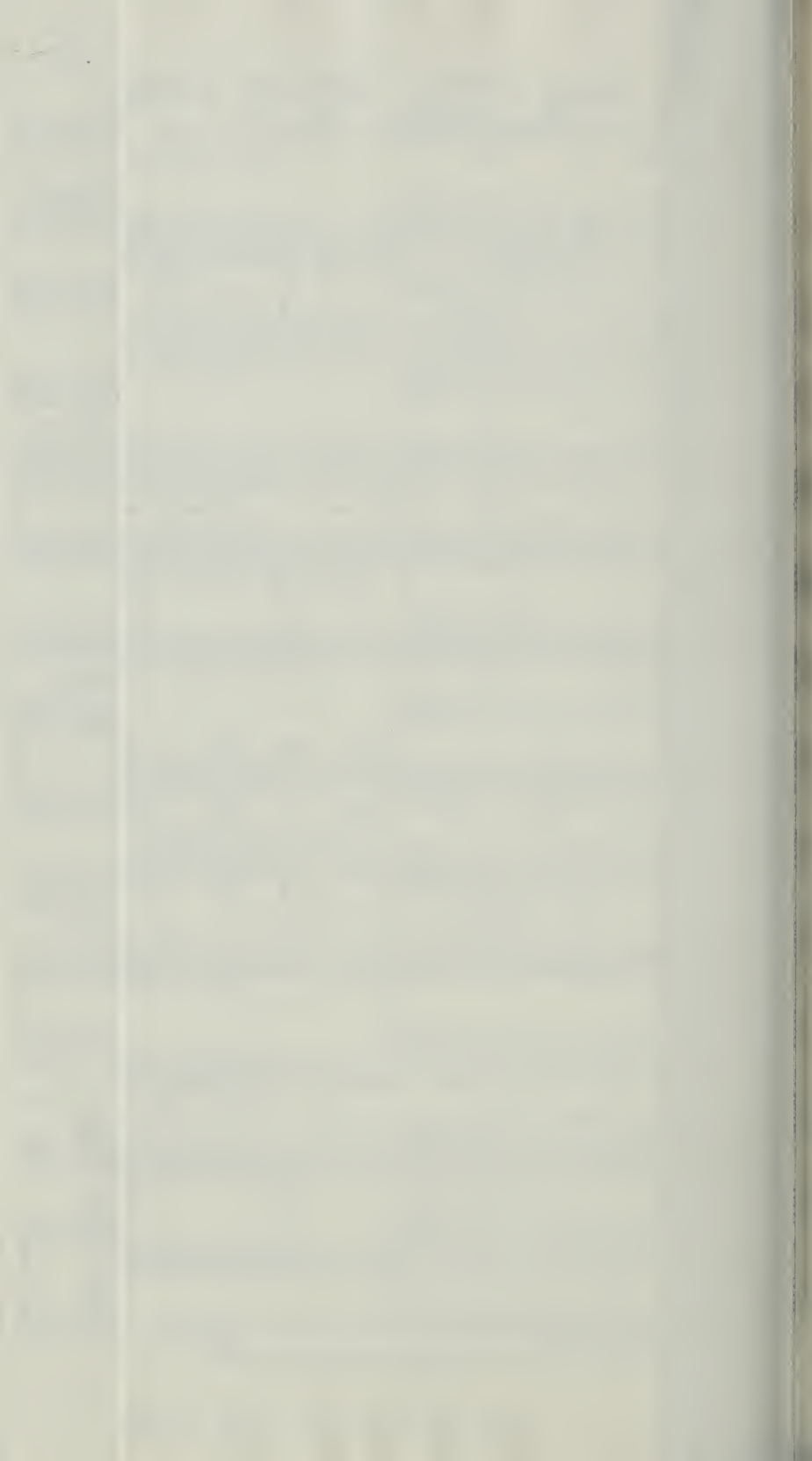
eyes, pre - tend - ing that I'm some - one else? You must break the

spell, this cloud that I'm un - der. So please won't you

tell, dar - ling, WHERE IS YOUR HEART? When HEART?

*dim. e rall.*

Where 2

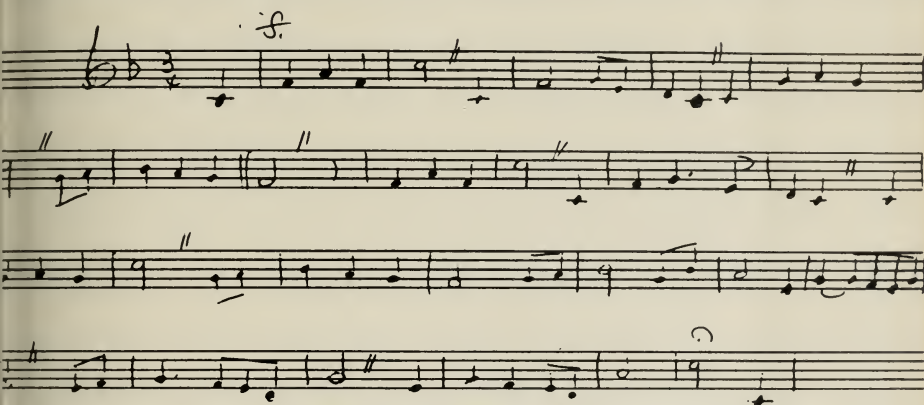


## EXHIBIT No. 2

*dal segno - sign repeat.*

"WHERE IS YOUR HEART"

(Music by Leo Mantin)



"WHERE IS YOUR HEART"

(Words by Leo Mantin)

I kiss you again, again and again dear

I kiss in my dreams - but Where is Your Heart?

Needless to hope, to scheme and to wonder

Confusion of mind is what keeps us apart;

Every day, every night, the same is to repeat,

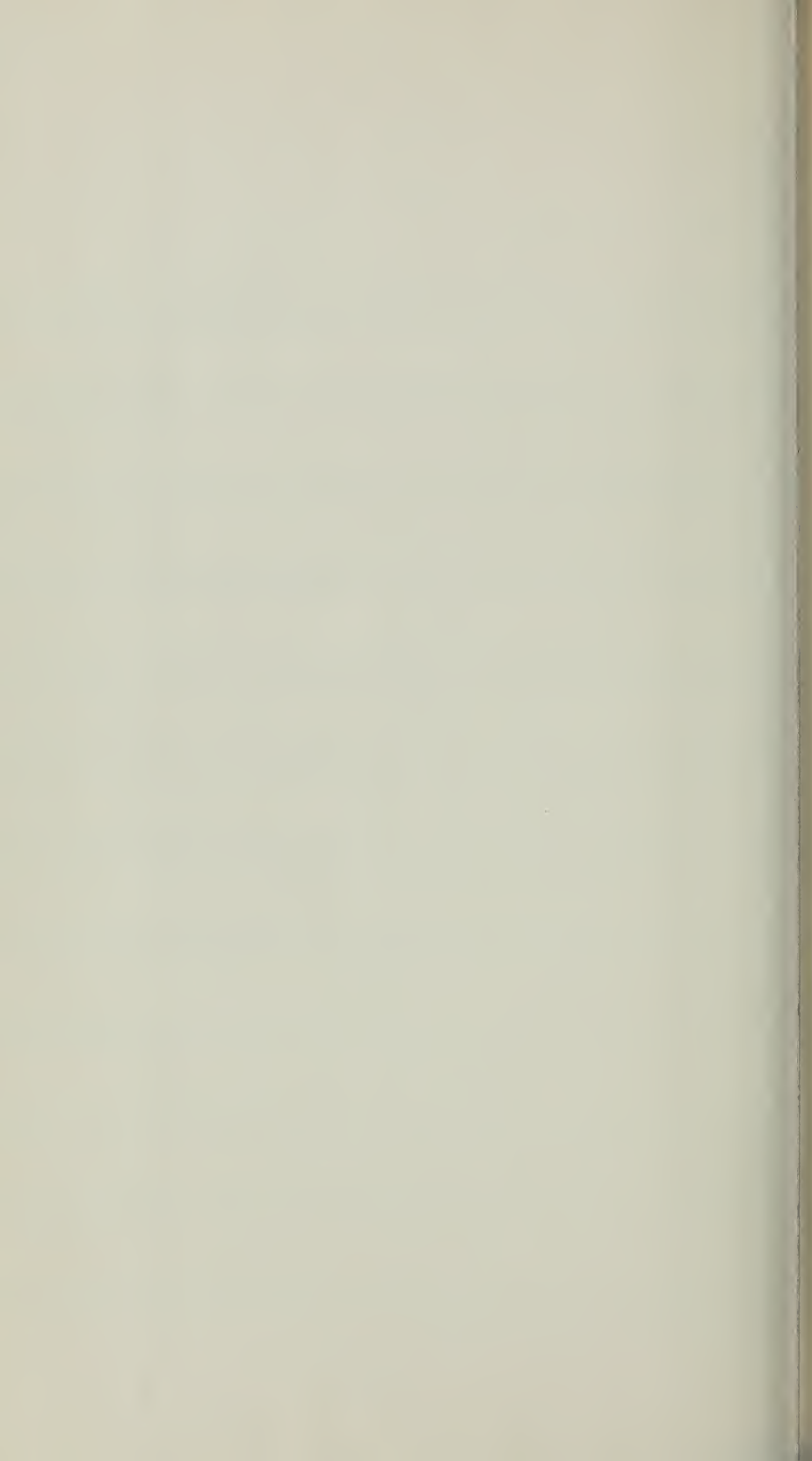
Maybe wrong or maybe right

But darling, have a heart dear.











In the Superior Court of the State of California in  
and for the County of Los Angeles

No. 427556

JOHN ITALIANI,

Plaintiff,

vs.

METRO-GOLDWYN-MAYER CORPORATION,  
a corporation, LOEW'S, INCORPORATED, a  
corporation, JOHN DOE, JANE DOE, RICH-  
ARD ROE, DOE COMPANY, a corporation,  
and ROE COMPANY, a corporation,

Defendants.

COMPLAINT FOR DAMAGES FOR MISAP-  
PROPRIATION OF LITERARY PROPERTY  
AND FOR ACCOUNTING OF PROFITS

Plaintiff complains of the defendants, and each  
of them, and for cause of action alleges:

I.

That plaintiff is a resident of the County of Los  
Angeles, State of California.

II.

That the defendant, Metro-Goldwyn-Meyer, a cor-  
poration, is a corporation duly organized and exist-  
ing under and by virtue of the laws of the State of  
New York and is duly authorized to do business,  
and is actually doing business in the State of Cali-  
fornia in the County of Los Angeles.

## III.

That the defendant, Loew's, Incorporated, a corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is duly authorized to do business, and is actually doing business in the State of California in the County of Los Angeles.

## IV.

That the defendants John Doe, Jane Doe, Richard Roe, Doe Company, a corporation, and Roe Company, a corporation, are sued [50] herein under fictitious names for the reason that their true names are unknown to the plaintiff, and when and if such true names are ascertained, plaintiff will ask leave of court to amend this complaint so as to insert therein the true names of said defendants.

## V.

That at all times herein mentioned, plaintiff was and now is an author and writer, and prior to the 1st day of February, 1933, invented, originated, composed and wrote a certain original literary composition and moving picture scenario entitled "Johnny of the Circus"; and at all times since said date, and at all times herein mentioned, said plaintiff has retained said literary composition and moving picture scenario in manuscript form and has not published or dedicated the same in any manner whatsoever, and plaintiff has not consented to the use of said literary composition and moving picture scenario, or any part or portion thereof, by any person or by any firm whatsoever, and at all times

herein mentioned, and at the present time, plaintiff herein retains all of the common law literary rights and all other rights therein and thereto.

## VI.

That during the month of June, 1933, the plaintiff submitted the above mentioned literary composition and moving picture scenario entitled "Johnny of the Circus" to the defendant, Metro-Goldwyn-Mayer Corporation, a corporation, by and through its respective officers, agents, servants and employees; that said defendant corporation, by and through its respective officers, agents, servants and employees, read and examined said literary composition and moving picture scenario for a sufficient time to accomplish said reading and examination notified plaintiff that said literary composition and moving picture scenario, and after retaining said literary composition and moving picture scenario for a sufficient time to accomplish said reading and examination notified plaintiff that said literary composition and moving picture scenario was unsuitable for its use, and rejected it, and on or about the 17th day of August, 1933, returned the same to plaintiff herein. [51]

## VII.

Plaintiff is informed and believes, and upon such information and belief alleges that the defendants, and each of them, without the knowledge, consent or authority of or from the plaintiff, during the latter part of the year 1933, and continuously to and including the present time, did deliberately and

unlawfully copy and appropriate plaintiff's said literary composition and moving picture scenario, and said defendants did, for profit, reproduce, sell, distribute and exhibit the same in a sound and talking motion picture photoplay entitled and designated "O'Shaughnessy's Boy." That defendants, and each of them, hold, use and represent to the public in advertising, publicity upon the screen, and otherwise, that said motion picture photoplay entitled "O'Shaughnessy's Boy" is fully original with them and is their sole and exclusive property; but in truth and in fact said motion picture photoplay entitled "O'Shaughnessy's Boy" copies, appropriates and embodies plaintiff's said literary composition and moving picture scenario entitled "Johnny of the Circus", and defendants, and each of them, have inextricably intermingled the same with other literary matter not found in plaintiff's said literary composition and moving picture scenario herein referred to, but which defendants have cunningly and shrewdly combined therewith.

### VIII.

That defendants, and each of them, released, exhibited and distributed said motion picture photoplay entitled "O'Shaughnessy's Boy" during the latter part of the year 1935, and that plaintiff, during the latter part of the year 1936, saw the said motion picture photoplay in the City of Los Angeles, State of California, and that on or about the 1st day of December, 1936, plaintiff herein notified and advised the defendants that they would be held



responsible for all damages resulting from the unlawful and unauthorized use of plaintiff's said literary composition and moving picture scenario; [52] that plaintiff is informed and believes, and upon such information and belief alleges the facts to be that immediately upon receipt of said notice, the said defendants took said motion picture photoplay, entitled "O'Shaughnessy's Boy", off schedule in the southern part of the State of California, but notwithstanding said notice, defendants continue to release, distribute and exhibit said motion picture photoplay throughout other parts of the world.

### IX.

That plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Metro-Goldwyn-Mayer Corporation, a corporation, received large sums of money as profits from the sale, lease and distribution of the film of the said motion picture photoplay, the exact amount being to the plaintiff unknown; but plaintiff is informed and believes, and upon such information and belief alleges that the said profits were in excess of \$1,000,000.00.

### X.

That plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Loew's, Incorporated, a corporation, received large sums of money as profits from the release and distribution of the said motion picture, the exact amount being to the plaintiff unknown, but that plaintiff is informed and believes, and upon such

information and belief alleges that said profits were in excess of \$1,000,000.00.

### XI.

That when the exact amount of said profits so realized by each and all of the defendants is ascertained, plaintiff will pray leave of court to insert such exact amounts in place of the amounts hereinbefore alleged.

### XII.

That prior to the plagiarizing, pirating and adopting of said original literary composition and moving picture scenario, [53] entitled "Johnny of the Circus", the said literary composition and moving picture scenario had an actual value of \$100,000.00 for use as a basis for a motion picture photoplay. That by reason of the unauthorized use of the said literary composition and moving picture scenario in the making and presentation of the said motion picture photoplay, entitled "O'Shaughnessy's Boy", as aforesaid, the said literary composition and moving picture scenario, entitled "Johnny of the Circus", has become valueless for use in making and presenting a motion picture photoplay.

That solely as a result of the plagiarizing, pirating and adapting of the said literary composition and moving picture scenario by the defendants, as aforesaid, the plaintiff has been damaged in the sum of \$100,000.00.

### XIII.

That by reason of the premises, the plaintiff has been deprived of international screen and literary



credits and reputation and has been deprived of the exclusive, rights, privileges and profits to which he is entitled as the author and owner of said original literary composition and moving picture scenario, entitled "Johnny of the Circus".

XIV.

Plaintiff is informed and believes, and upon such information and belief alleges that each and all of the acts and conduct of the defendants, and each of them, hereinabove set forth were and are wrongful, malicious, oppressive and deliberately contrived and designed to cheat and defraud the plaintiff of and from screen credit, reputation and all other of his said rights, privileges and profits in and to the said original literary composition and motion picture scenario entitled "Johnny of the Circus".

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. For his damage in the sum of \$100,000.00;
2. For an accounting of all profits which the defendants, and each of them, have made by reason of the acts herein alleged;
3. For such other and further relief as to the court may seem just and equitable.

/s/ ARTHUR WEBB,

/s/ WALLACE COLLINS,

Attorneys for Plaintiff [55]

Duly Verified. [56]

County Clerk's Certification of True Copy attached.

[Title of Superior Court and Cause No. 427,556.]

AMENDED COMPLAINT FOR DAMAGES FOR  
MISAPPROPRIATION OF LITERARY  
PROPERTY AND FOR ACCOUNTING OF  
PROFITS

Comes now plaintiff and by leave of court first had and obtained files this, his amended complaint, and for cause of action against the defendants and each of them alleges:

[Printer's Note: The Amended Complaint is the same as the Complaint set out at pages 27-33 except for paragraph VII which follows.]

\* \* \* \* \*

VII.

That at and in the County of Los Angeles, State of California, within three years of the filing of this complaint, plaintiff is informed and believes and upon such information and belief alleges that the defendants and each of them, without the knowledge, consent or authority of or from the plaintiff, and continuously during said time, did deliberately and unlawfully appropriate and convert to their own use plaintiff's said literary composition and moving picture scenario and said defendants did, for a profit, reproduce, sell, distribute and exhibit the same in a sound and talking motion picture photoplay entitled and designated "O'Shaughnessy's Boy". That defendants, and each of them, hold, use and represent to the public in advertising, publicity

upon the screen and otherwise that said motion picture photoplay entitled "O'Shaughnessy's Boy" is fully original with them and is their sole and exclusive property, but in truth and in fact the said motion picture photoplay entitled "O'Shaughnessy's Boy" copies, appropriates and embodies plaintiff's said literary composition and moving picture scenario entitled "Johnny of the Circus" and defendants and each of them have inextricably intermingled the same with other literary matters not found in plaintiff's said literary composition and moving picture scenario herein referred to, but which defendants have cunningly and shrewdly combined therewith. [59]

\* \* \* \* \*

Affidavit of Service by Mail attached. [63]

---

Additional Certificate (17 U.S.C. 215)

Class Exxx. No. 518734

Copyright Office of the United States of America  
The Library of Congress : Washington

**CERTIFICATE OF COPYRIGHT  
REGISTRATION**

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and

that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of James A. Webb, R.R. 3, Lithonia, Ga.

Title: The Soldier's Plea, or, Where Is Your Heart? Words by James A. Webb. Music by Pauline B. Story, of United States. (Words and melody).

Copy received Aug. 30, 1921.

[Seal]            /s/ ARTHUR (Illegible),  
Register of Copyrights            [64]

---

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 49787

Copyright Office of the United States of America  
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Donn Heyward Marsh, 420 So. Illinois St., Villa Park, Ill.



Title: Where Is Your Heart? Words and music by Donn Marsh, (Donn Heyward Marsh), of United States.

Copy received Jan. 6, 1932 (Photoprt.)

[Seal]            /s/ ARTHUR (Illegible),  
Register of Copyrights            [65]

---

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 135744

Copyright Office of the United States of America  
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Randall McClelland, 902 South Marengo St., Pasadena, California.

Title: Where Is Your Heart. Words-Music by Randall McClelland, of United States. (Words and melody).

Copy received Nov. 27, 1936.

[Seal]            /s/ ARTHUR (Illegible),  
Register of Copyrights            [66]

Additional Certificate (17 U.S.C. 215)

Class E unp. No. 140536

Copyright Office of the United States of America  
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Sylvester Long Cross, 607 Studio Bldg., Portland, Oregon.

Title: Where Is Your Heart? Words by Ida Lowe Ailiff. Music by Sylvester Long Cross, of United States. (Piano with words)

Copy received Feb. 19, 1937.

[Seal]

/s/ ARTHUR (Illegible),

Register of Copyright

[67]



Additional Certificate (17 U.S.C. 215)

Class E unp. No. 197987

Copyright Office of the United States of America  
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Thomas Gordon Dennis, Canfield Rd., Convent, N. J.

Title: Where Is Your Heart? Words and music by Thomas Gordon Dennis, of United States.

Copy received June 30, 1939.

[Seal]

/s/ ARTHUR (Illegible),

Register of Copyright

[68]

Additional Certificate (17 U.S.C. 215)

Class E un. No. 209074

Copyright Office of the United States of America  
The Library of Congress : Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that One copy of the musical composition named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Richard Cameron Carder, 2107 Fairmount Ave., Philadelphia, Pa.

Title: Where's Your Heart? Words and music by "Dick Carder" (Richard Cameron Carder), of United States. (Words and melody.)

Copy received Nov. 24, 1939.

[Seal]            /s/ ARTHUR (Illegible),  
Register of Copyright            [69]

Additional Certificate (17 U.S.C. 215)

Class E un. No. 74528

CERTIFICATE OF REGISTRATION

of a Claim to Copyright in a Musical Composition

This Is To Certify that the following statements

for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

[Seal]            /s/ Arthur (Illegible)

Register of Copyrights, United States of America

1. Copyright Claimant or Claimants: Beryl Helen Rodrigue (Mrs. Richard R. Rodrigue), 2131 Audubon St., New Orleans, La.

2. Title of Musical Composition: Where Is Your Heart?

3. Composers, Authors, Etc. Full name, pseudonym, if any, year of birth and designation of authorship (such as music, words, arrangement, etc.) are requested for cataloging purposes. Citizenship must be given.

(a) Name: Beryl Helen Rodrigue. Citizenship: U. S. Pseudonym: Where Can It Be? Original in Key of 'G'. Nature of Authorship: Where Is Your Heart? Domicile: 2131 Audubon St., New Orleans, La. Birth: 1913.

\* \* \* \* \*

4. Send Certificate to: Mrs. Richard R. Rodrigue, 2131 Audubon St., New Orleans 18, Louisiana.

Dates of Receipt in Copyright Office: Application: May 9, 1947. One Copy: May 9, 1947. [70]

\* \* \* \* \*

Additional Certificate (17 U.S.C. 215)

Class E pub. No. 69688 E

## CERTIFICATE OF REGISTRATION

of a Claim to Copyright in a Musical Composition

This Is To Certify that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

[Seal]           /s/ Arthur (Illegible),  
Register of Copyrights, United States of America

1. Copyright Claimant or Claimants: Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y.

2. Title of Musical Composition: The Song From Moulin Rouge (Where Is Your Heart).

3. Composers, Authors, Etc. Full name, pseudonym, if any, year of birth and designation of authorship (such as music, words, arrangement, etc.) are requested for cataloging purposes. Citizenship must be given.

(a) Name: William Engvick. Citizenship: U.S.A. Pseudonym: ..... Author of words. Domicile: Stony Point, New York. Birth: .....

(b) Name: Georges Auric. Citizenship: France. Pseudonym: ..... Author of music. Domicile: Paris, France. Birth: .....

\* \* \* \* \*

4. Send Certificate to: Leonard S. Mietus (Index) Broadcast Music, Inc., 580 Fifth Avenue, New York 36, N. Y.

\* \* \* \* \*

6. For Published Works Only: (Date first placed on sale, sold, or publicly distributed). Fill in either (a) or (b):

(a) If first published in the United States: February 6, 1953.

\* \* \* \* \*

Dates of Receipt in Copyright Office: Application: Feb. 20, 1953. Two Copies: Feb. 20, 1953.

---

[Title of District Court and Cause.]

## PLAINTIFF'S OBJECTIONS TO PROPOSED ORDER OF DISMISSAL

Now Comes the plaintiff and files the following written detailed statement of his objections to defendants' proposed "Judgment of Dismissal on Merits for Failure to State a Ground Upon Which Relief Can Be Granted", together with his reasons therefor, pursuant to Rule 7 of the local rules of the United States District Court for the Southern District of California, to-wit:

Objections to Form and Content of Paragraph Numbered "3" (Page 2, Lines 19-28).

1. The word "published" (page 2, line 22) is misused and misinterpreted. "Publication" without the knowledge, authority or consent of plaintiff could not divest plaintiff of his common-law copyrights. The judgment implies voluntary [102] publication with plaintiff's consent. Any involuntary



publication by one defendant could not possibly benefit either such defendant or any other defendant engaging in independent successive and different acts of infringement upon the various exclusive, independent, common-law rights owned by plaintiff such as (1) his sole right of performance, (2) his sole right to publish sheet music, (3) his sole right to manufacture and sell phonograph record, (4) his sole right to broadcast by radio, (5) his sole right to license for use in motion pictures, (6) his sole right to license use on television, etc.

2. There is no allegation in the complaint concerning "publication by the defendant United Artists Corporation." Paragraph IX (page 5, line 21) alleges that "during the year 1953 \* \* \* defendant Broadcast Music, Inc. published or caused to be published said song", but plaintiff presented to the Court said defendant's certificate of copyright registration upon said song, Class No. E 69668, reciting the date such song was "first placed on sale, sold, or publicly distributed" as February 6, 1953 (less than two years prior to the commencement of the action). Plaintiff's causes of action against defendant Broadcast Music, Inc. were not and could not be barred by the provisions of the California Statute of Limitations, Code of Civil Procedure Section 399, subdivision 1, for the reason that no cause of action of any nature arose as to said defendant more than two years prior to the commencement of the within action. Plaintiff could not have filed suit against defendant Broadcast Music,



Inc. prior to the date said defendant published said music in sheet music form and prior to the date said defendant licensed performance by others, because no liability for infringement by said defendant had been created or incurred and no cause of action could arise until infringing acts were committed by said defendant [103] Broadcast Music, Inc.

3. The first date of infringement upon plaintiff's rights by manufacture, sale and distribution of phonograph records is alleged in paragraph X of the first cause of action of the complaint (page 6, line 2) to have commenced on or about February 1, 1953, by the defendant record companies, including defendant Radio Corporation of America, defendant Capitol Records Distributing Corporation, and defendant Columbia Records, Inc. Each act alleged to have been committed by each of these defendants was within two years prior to the commencement of the action. No action for infringement could have been commenced against any of these defendants prior to their respective invasions of plaintiff's rights, or prior to the date any of said defendants manufactured, sold or distributed the first phonograph record containing defendants' infringing song.

4. Plaintiff's causes of action against defendant Columbia Broadcasting System, Inc. and the other radio network defendants for performance and broadcast of defendants' infringing song over their network facilities, is alleged to have commenced "on

or about the first day of February, 1953, up to and including the date of filing this complaint" (Complaint, page 6, paragraph XI, line 19). Plaintiff could claim no cause of action against any of these network defendants prior to the date of commission of any infringing act by any of said defendants. Each of said infringing acts is affirmatively alleged to have taken place within two years prior to the commencement of the action. The statute of limitations is therefore inapplicable to these defendants.

Objections to Conclusions of Law and Order  
(Page 3, Lines 2-9)

1. No portion of plaintiff's first cause of action is barred as to any defendant except United Artists Corporation. As to such defendant, plaintiff's cause of action for damages and profits is barred only with respect to those exhibitions and such distribution as occurred prior to January 19, 1953 within the State of California. A motion to dismiss is inapplicable as to such portion of such cause of action. Said defendant's remedy is by pleading a separate, affirmative defense to such portion of plaintiff's causes of action against defendant United Artists Corporation as allege damages and profits arising prior to January 19, 1953.

2. Even assuming the California statute of limitations is applicable to the defendant United Artists Corporation with respect to infringing acts within the State of California prior to January 19, 1953, it is inapplicable to causes of action arising in

the other forty-seven states of the United States since February 1, 1953, upon which date the complaint, as amended by stipulation, alleges that said defendant "released and caused to be exhibited in each and all of the other states of the United States and throughout the world" said motion picture photoplay containing said infringing song. In no event should this action be dismissed with prejudice or on the merits as to causes of action arising in other states at times and under circumstances when they would not be barred either by the California statute of limitations or by the statutes of limitations in such other states. There is no present showing as to what such statutes provide and the motion to dismiss is not based thereon. [105]

3. Plaintiff's second cause of action affirmatively alleges that "defendants have continuously since on or about the 1st day of February, 1953, engaged in unfair competition with the plaintiff" (Complaint, paragraph IV, page 9, lines 1-4). Separate, independent acts of unfair competition committed by each and all of said defendants is not barred by the California statute of limitations, nor is there any showing of any statutory bar in any other state, with respect to acts committed since January 19, 1953.

4. Plaintiff's third cause of action is to enjoin future infringements which are threatened and intended by each and every defendant named (Complaint, paragraph II, page 9, line 26). No statute of limitations can bar infringements which have not

occurred, but which are threatened and intended to occur in the future.

Respectfully submitted,

FENDLER & LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff [106]

Affidavit of Service by Mail attached. [107]

[Endorsed]: Filed September 27, 1955.

---

In the United States District Court for the Southern District of California, Central Division

No. 17785-PH

LEO MANTIN, Plaintiff,  
vs.

BROADCAST MUSIC, INC., a New York corporation, et al., Defendants.

JUDGMENT OF DISMISSAL ON MERITS  
FOR FAILURE TO STATE A GROUND  
UPON WHICH RELIEF CAN BE GRANTED  
(STATUTE OF LIMITATIONS)

This matter came on for hearing this 19th day of September, 1955 before the above entitled Court, the Honorable Peirson M. Hall, Judge presiding, on the Motion of the Defendants Broadcast Music, Inc., a New York corporation; United Artists Corporation, a Delaware corporation; Columbia Broadcasting System, Inc., a New York corporation;



Radio Corporation of America, a Delaware corporation; Capitol Records Distributing Corp., a Delaware corporation, formerly known as Capitol Records Distributing Co., Inc., of California, and Capitol Records Distributing Co., Inc., of Georgia, and Columbia Records, Inc., formerly known as Columbia Recording Corporation, a Delaware corporation to dismiss the action pursuant to Rules 9 (f) and 12 (b) (6) for failure to state a claim against the defendants or any of them upon which relief can be granted; Messrs. Wright, Wright, Green and Wright, Loyd Wright and Charles A. Loring by Charles A. Loring, Esquire [108] appearing as counsel for the moving defendants and Harold A. Fendler, Esquire appearing as counsel for plaintiff; said Motion having been fully argued and submitted to the Court for decision and the Court being fully advised in the premises; the Court finds that:

1. The musical composition of the defendants' entitled the "Song From Moulin Rouge" ("Where Is Your Heart") is sufficiently similar to the musical composition of the plaintiff "Where Is Your Heart" insofar as the pleadings in this case only are concerned to support a claim in favor of plaintiff for infringement. This finding shall not constitute an adjudication of said issue upon the merits but only so far as this Motion is concerned.

2. The plaintiff has not published his musical composition within the meaning of the law of the State of California so as to lose his rights therein and dedicate the same to the public. This finding is

a finding only insofar as this Motion is concerned and shall not constitute an adjudication on the merits.

3. It appears from the pleadings as amended by Stipulation that the defendants' musical composition entitled "Song From Moulin Rouge" ("Where Is Your Heart") was first published by the defendant, United Artists Corporation, on December 23, 1952, more than two years prior to the commencement of the within action and that plaintiff's causes of action and each of them, if any, against the defendants, and each of them, are barred by the Statute of Limitations of the State of California, to-wit: By the provisions of California Code of Civil Procedure Section 399 Subdivision 1.

From such findings the Court concludes that the Motion of the defendants, and each of them, to dismiss plaintiff's Complaint herein on the ground that it fails to state a claim upon which relief can be granted pursuant to the provisions of Federal [109] Rule 9 (f), 12 (b) (6) in that plaintiff's said causes of action, and each of them, if any, are barred by the Statute of Limitations of the State of California, to-wit: By the terms and provisions of California Code of Civil Procedure Section 339 Subdivision 1, should be and the same is hereby granted.

It Is Ordered, Adjudged and Decreed that the above entitled action be and it is hereby dismissed as of this date on the merits with prejudice for failure to state a claim upon which relief can be granted.



Dated: May 10th, 1956.

By the Court.....

/s/ PEIRSON M. HALL,  
Judge U.S.D.C.S.D.

Not approved as to form:

FENDLER & LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff [110]

[Endorsed]: Filed May 10, 1956. Docketed and  
Entered May 14, 1956.

---

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Leo Mantin, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment of Dismissal on Merits for Failure to State a Ground Upon Which Relief Can Be Granted (Statute of Limitations)", entered in this action on May 14, 1956.

Dated: This 4th day of June, 1956.

FENDLER & LERNER,  
HAROLD A. FENDLER and  
ROBERT W. LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff, Leo Mantin

Affidavit of Service by Mail attached. [112]

[Endorsed]: Filed June 6, 1956.

[Title of District Court and Cause.]

### STATEMENT OF POINTS ON APPEAL

Now comes appellant and files the following statement of his points on appeal:

1. The Court erred in granting the judgment of dismissal herein, and said judgment is contrary to law.

2. The Court erred in concluding that the motion of defendants-appellees, and each of them, to dismiss plaintiff's complaint should be granted, and the order granting the same is contrary to law.

3. The Court erred in failing to sustain each of plaintiff-appellant's objections to said judgment of dismissal and the findings and conclusions contained therein, for each of the reasons [113] and upon each of the grounds stated therein.

4. No cause of action stated in plaintiff's complaint is barred by any statute of limitations as to any of the defendants-appellees herein.

Dated: This 8th day of June, 1956.

FENDLER & LERNER,  
HAROLD A. FENDLER and  
ROBERT W. LERNER

/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff-  
Appellant

Acknowledgment of Service attached. [114]  
[Endorsed]: Filed June 8, 1956.

[Title of District Court and Cause.]

## STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated and Agreed by and between the above named parties, through their respective counsel, that the record on appeal shall consist of the following:

1. The complaint filed January 19, 1955, including Exhibits "A" and "B", filed with the Clerk of this Court.

2. Stipulation re amendment to complaint, dated April 12, 1955.

3. Defendants' "Motion to Dismiss Under Rules 9 (f) and 12 (b) (6)". (Omit "Notice of Motion" and "Points and Authorities in Support of Motion".) [115]

4. Plaintiff's objections to proposed order of dismissal.

5. Judgment of dismissal entered May 14, 1956.

6. Notice of appeal.

7. Statement of points on appeal.

8. Certificate of Registration of copyright numbered E pub. 69688 E, issued to defendant Broadcast Music, Inc., and all exhibits attached to defendants' closing memorandum of points and authorities in support of defendants' motion to dismiss, including complaint and amended complaint for damages in Superior Court action numbered 427556, entitled "John Italiani, Plaintiff vs. Metro-Goldwyn-Mayer Corporation, et al., Defendants", and certificates of copyright registration respectively num-

bered 518734, 49787, 135744, 140536, 197987, 209074 and 74528, each of which contain a title or alternate title "Where Is Your Heart?"

9. Affidavits of Paul Kerby and Werner Janssen.

10. This stipulation as to record on appeal.

Dated: This 27th day of June, 1956.

FENDLER & LERNER

HAROLD A. FENDLER and

ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,

Attorneys for Plaintiff-Appellant

LOYD WRIGHT,

CHARLES A. LORING,

WRIGHT, WRIGHT, GREEN &

WRIGHT,

/s/ By DUDLEY K. WRIGHT,

Attorneys for Defendants-Appellees

[Endorsed]: Filed July 9, 1956.

---

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 116, inclusive, contain the original

Complaint;

Plaintiff's exhibits A and B;

Stipulation re Amendment of Complaint;

Affidavits of Paul Kerby and Werner Janssen;  
Plaintiff's Objections to Proposed Order of Dis-  
missal;

Judgment of Dismissal on Merits for Failure to  
State a Ground upon which Relief can be granted;

Notice of Appeal;

Statement of Points on Appeal;

Stipulation as to Record on Appeal; and Certi-  
ficate of Copyright Registration Nos. 518734, 49787,  
135744, 140536, 197987, 209074 and 74528, which, to-  
gether with a photostatic copy of Complaint and  
Amended Complaint filed in the Superior Court for  
the State of California, County of Los Angeles, Case  
No. 427556; and a photostatic copy of Certificate  
of Registration E pub. 69688 E; all in the above-  
entitled cause, constitute the transcript of record on  
appeal to the United States Court of Appeals for  
the Ninth Circuit, in the above case.

I further certify that my fees for preparing the  
foregoing record amount to \$2.00, which sum has  
been paid by appellant.

Witness my hand and seal of the said District  
Court this 11th day of July, 1956.

JOHN A. CHILDRESS,  
Clerk

/s/ By CHARLES E. JONES,  
Deputy



[Title of District Court and Cause.]

CERTIFICATE OF FINALITY UNDER RULE  
54(b) (NUNC PRO TUNC)

It appearing from the records and files herein that the Court inadvertently failed to sign and file a certificate of finality under and pursuant to Rule 54(b), and it having been the intention of the Court so to do in order to permit an immediate appeal to, and determination by, the United States Court of Appeals for the Ninth Circuit, and such intention having been evidenced by the designation of the judgment herein as a "Judgment of Dismissal on Merits"; now, therefore, [2]

It Is Expressly Ordered and Determined that there is no just reason for delay, and the Clerk of the above entitled Court is Expressly Ordered and Directed to enter said "judgment on the merits" as a final judgment against the plaintiff, Leo Mantin, and in favor of each of the defendants named and designated in said judgment nunc pro tunc as of May 14, 1956, the date of entry of said "Judgment of Dismissal on Merits".

Dated August 2, 1956.

/s/ PEIRSON M. HALL,  
Judge of U. S. District Court

It is hereby stipulated that the foregoing Order

may be signed and filed herein and the same is hereby approved as to form.

FENDLER & LERNER,  
HAROLD A. FENDLER and  
ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff-Appellant

LOYD WRIGHT,  
CHARLES A. LORING,  
WRIGHT, WRIGHT, GREEN &  
WRIGHT,

/s/ By DUDLEY K. WRIGHT,  
Attorneys for Defendants-Appellees

[Endorsed]: Filed August 2, 1956.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Leo Mantin, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment of Dismissal on Merits", etc., entered in this action as a final judgment against the plaintiff nunc pro tunc as of May 14, 1956 pursuant to a Certificate of Finality under Rule 54(b) filed August 2, 1956.

Dated this 2nd day of August, 1956.

FENDLER & LERNER,  
HAROLD A. FENDLER and  
ROBERT W. LERNER,  
/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff,  
Leo Mantin [4]

Affidavit of Service by Mail attached. [5]

[Endorsed]: Filed August 3, 1956.

---

[Title of District Court and Cause.]

STIPULATION RE NOTICE OF APPEAL  
AND INCLUSION OF CERTIFICATE OF  
FINALITY UNDER RULE 54(b) IN REC-  
ORD ON APPEAL

It Is Hereby Stipulated by and between counsel for the above named plaintiff-appellant and the above named defendants-appellees that the notice of appeal heretofore filed on June 6, 1956, in the above entitled action shall for all purposes be deemed to be a notice of appeal from the final judgment entered nunc pro tunc as of May 14, 1956, pursuant to the Certificate of Finality under Rule 54(b); and

It Is Furthermore Stipulated that the record on appeal shall include said "Certificate of Finality Under Rule 54(b)", and this stipulation and notice of appeal dated August 2, 1956.

Dated August 2, 1956.

FENDLER & LERNER,  
HAROLD A. FENDLER and  
ROBERT W. LERNER,

/s/ By HAROLD A. FENDLER,  
Attorneys for Plaintiff-Appellant

LOYD WRIGHT,  
CHARLES A. LORING,  
WRIGHT, WRIGHT, GREEN &  
WRIGHT,

/s/ By DUDLEY K. WRIGHT,  
Attorneys for Defendants-Appellees

[Endorsed]: Filed August 3, 1956.

---

[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 6, inclusive, contain the original Certificate of Finality; Notice of Appeal; Stipulation re Notice of Appeal and Inclusion of Certificate of Finality; all in the above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the

foregoing Supplemental Record amount to \$2.00 which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 12th day of September, 1956.

[Seal]                      JOHN A. CHILDRESS,  
Clerk

/s/ By CHARLES E. JONES,  
Deputy

---

[Endorsed]: No. 15188. United States Court of Appeals for the Ninth Circuit. Leo Mantin, Appellant, vs. Broadcast Music, Inc., a corporation et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 12, 1956.

Supplemental Filed: Sept. 14, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.





District Court for the Southern District of California, Central Division.

The foregoing shall be deemed to be compliance with Rule 17, subdivision (6) of the Rules of the United States Court of Appeals for the Ninth Circuit.

Dated: July 20, 1956.

FENDLER & LERNER,  
HAROLD A. FENDLER,  
ROBERT W. LERNER and  
ROBERT HAVES,

/s/ By HAROLD A. FENDLER,  
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1956. Paul P. O'Brien,  
Clerk.